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APPENDIX A

[Filed July 20, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3375

TGX CORP.,

versus

Plaintiff,

GLORIA ANNETTE TURNER SIMMONS, *et al.*,
Defendants-Appellants
Cross-Appellees,

versus

GREENWICH INSURANCE COMPANY, *et al.*,
Defendants-Appellees
Cross-Appellants.

GAYLON D. SIMMONS, *et al.*,
Plaintiffs-Appellants
Cross-Appellees,

versus

J.C. TEMPLETON, *et al.*,
Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

No. 92-1662

PACIFIC MUTUAL LIFE INSURANCE CO.,
Plaintiff-Appellant,

versus

FIRST REPUBLICBANK CORP., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

Plaintiffs who suffered dismissals in two separate securities-fraud cases asked the district courts to reinstate their claims under § 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which Congress enacted in November 1991. The district courts denied these motions after holding that § 27A(b) violates the Constitution by disturbing final judgments and invading judicial authority. We conclude that the legislation is constitutional and we reinstate the plaintiffs' suits.

I. BACKGROUND

A. PACIFIC MUTUAL LIFE INS. CO. v. FIRST REPUBLICBANK CORP., ET AL.

In March 1991, Pacific Mutual Life Insurance Company (PMLI) sued investment bankers and accountants

(collectively PMLI Defendants)[1] for securities fraud under § 10(b) of the 1934 Securities Exchange Act (1934 Act), 15 U.S.C. § 78j(b). PMLI's claims arise from the June 1987 merger of InterFirst Corporation and RepublicBank Corporation, PMLI's purchase of InterFirst securities in July and September 1987 for approximately $8 million, and the PMLI Defendants' facilitation of those transactions.

From long before PMLI purchased the securities to the time after PMLI filed its suit, this court determined the statute of limitations for implied private actions under § 10(b) according to analogous state law. When PMLI filed its suit in the United States District Court for the Northern District of Texas, our precedent recognized that the four-year limitations period applicable to fraud actions in Texas also governs § 10(b) actions filed there. *In re Sioux, Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). For that reason, although the PMLI Defendants filed dispositive motions under FED. R. CIV. P. 9(b) and 12(b)(6), they did not contest the timeliness of PMLI's suit.

While these motions awaited the district court's consideration, the Supreme Court issued *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991). *Lampf* implicitly overrules *Sioux, Ltd.* and many similar cases in other circuits with its holding that the Securities Exchange Act as written in 1934, not state law, establishes the limitations period for § 10(b) suits. *Id.* at 2780. The Court read the Securities Exchange Act of 1934 to establish a uniform rule that "[l]itigation instituted pursuant to § 10(b) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 2782 (1-and-3 rule).

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[1] The PMLI Defendants are Morgan Stanley & Co., Goldman Sachs & Co., Ernst & Young & Co., and Salomon Brothers Inc.

On the same day that the Court rendered *Lampf*, it decided *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991). A plurality of the *Beam* Court held that Georgia's Supreme Court erred by "refus[ing] to apply a rule of federal law retroactively after the case announcing the rule has already done so." *Id.* at 2446. *Beam* teaches that "when th[is] Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 2448.

Because the *Lampf* Court applied the 1-and-3 rule to eliminate Gilbertson's § 10(b) claim, *Beam* required courts to apply the limitation rule announced in *Lampf* to pending claims under § 10(b). The PMLI Defendants promptly brought *Lampf* and *Beam* to the district court's attention, and the court dismissed PMLI's § 10(b) claims with prejudice in August 1991. The district court based its dismissal on the fact that "the face of [PMLI's complaint establishes] that this action was filed more than three years after the alleged misrepresentations or omissions upon which [PMLI's] claim rests." Recognizing no way around *Lampf* and *Beam*, PMLI did not appeal.

Three months later, however, Congress provided a way around *Lampf* and *Beam* by passing § 27A, which provides:

> *(a) Effect on Pending Causes of Action.*—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> *(b) Effect on Dismissed Causes of Action.*—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after [December 19, 1991].

1934 Act, § 27A (amended by P.L. 102-242 (December 19, 1991)), *codified at* 15 U.S.C. § 78aa-1. On January 31, 1992, PMLI filed a motion to reinstate pursuant to § 27A(b). The PMLI Defendants challenged the constitutionality of § 27A(b), and the district court admitted the United States as an intervenor to explain why § 27A is constitutional. After considering the parties' written submissions, the district court held: 1) § 27A(b) contravenes due process by divesting the PMLI Defendants of their final judgment; and 2) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. PMLI appeals from the district court's denial of its motion to reinstate.

B. SIMMONS, ET AL. v. TGX CORP., ET AL.

In 1987, TGX Corporation sued Gaylon Simmons [2] over a $21 million stock purchase contract which the parties executed in November 1986, and Simmons filed a counterclaim against TGX under § 10(b). TGX filed for bankruptcy protection in 1990, staying the counterclaim. Simmons then filed a separate § 10(b) suit in March 1990 against attorneys, accountants, and directors (collectively TGX Defendants)[3] who facilitated the stock purchase.

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[2] Gloria Simmons joins Gaylon Simmons as a party to this dispute.

[3] The TGX Defendants are J.C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W.A. Griffin, Thomas L. Kister,

Simmons sued the TGX Defendants in the United States District Court for the Eastern District of Louisiana.[4] The parties disputed whether Simmons met Louisiana's two-year prescriptive period for securities fraud, which this court has held applicable to § 10(b) claims. *Jensen v. Stellings*, 841 F.2d 600, 606 (5th Cir. 1988). The Supreme Court rendered *Lampf* and *Beam* before the district court ruled on the parties' limitation dispute.

The TGX Defendants informed the district court that Simmons sued them in March 1990, and his complaint alleges November 1986 misdeeds. They argued that these facts entitled them to dismissal under *Lampf's* 1-and-3 rule. Simmons did not dispute the effect of *Lampf*, and the district court directed the TGX Defendants to draft a judgment and order. That document recited:

> all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and [the court finds that] final judgment should be entered. . . .
>
> [P]laintiffs' claims . . . under . . . the Securities Exchange Act of 1934 are hereby dismissed with prejudice.

Simmons asked the district court to delete "with prejudice" from the judgment to avoid any preclusive effect, and the court obliged before signing it in August 1991. Simmons did not appeal this judgment.

Simmons sought the deletion from the August 1991 judgment because he thought that he could avoid *Lampf* by adding the TGX Defendants as parties to the 1987

Leonard Leon, Edward T. Cotham, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Co., and William M. Templeton. Simmons amended his complaint to add Greenwich and W.M. Templeton as defendants in May 1991.

[4] The court consolidated this suit with the suit between TGX Corporation and Simmons.

counterclaim against TGX, and he did not want the dismissal in the March 1990 suit to preclude him from doing so. Simmons's idea ultimately proved unsuccessful,[5] and the district court entered another judgment dismissing Simmons's § 10(b) claims against the TGX Defendants in October 1991. Simmons did not appeal this October 1991 judgment.

With renewed hope from § 27A(b), Simmons filed a Motion to Reinstate the March 1990 suit in January 1992. The parties disputed both the applicability and constitutionality of § 27A(b). In March 1992, the district court held: 1) the court dismissed Simmons's March 1990 § 10(b) suit "as time barred" within the meaning of § 27A(b) despite the fact that the court dismissed the suit without prejudice in August 1991; and 2) Simmons timely filed his § 10(b) claims under Louisiana's two-year prescription period and *Jensen*; but 3) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. *TGX Corp. v. Simmons*, 786 F. Supp. 587 (E.D. La. 1992).

In April 1992, Simmons asked for a new trial on his reinstatement motion. In May 1992, the district court denied Simmons's motion for a new trial after holding that, in addition to *Beam's* implications, § 27A(b) violates due process principles by upsetting final judgments. Simmons appeals from the district court's denials of his motion to reinstate and his new-trial motion. The TGX Defendants cross-appeal the district court's ruling that Simmons's March 1990 suit falls within the scope of § 27A (b) even though the district court dismissed that suit

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[5] A magistrate permitted Simmons to amend his 1987 counterclaim for purposes of procedure only, but the district court held that the additional claims did not relate back to the 1987 claims, so those claims were still untimely. In its September 1991 minute entry explaining why Simmons's § 10(b) claims were still untimely, the district court stated that the August 1991 judgment did not preclude the amendment to the 1987 counterclaim because the court entered the August 1991 judgment without prejudice.

without prejudice in August 1991. The United States intervenes to defend the constitutionality of § 27A(b).

II. ANALYSIS

Simmons and *PMLI* ultimately raise the same novel constitutional questions, so we decide both appeals in this opinion. We review the district courts' decisions concerning the meaning and constitutionality of § 27A(b) *de novo*. *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We proceed without the benefit of prior appellate attention to § 27A(b).

A. Whether a Constitutional Section 27A(b) Helps Simmons

The TGX Defendants argue that § 27A(b) does not afford Simmons any relief even if it is constitutional, because Simmons asked the district court to dismiss his March 1990 claims under § 10(b) without prejudice. But all of their arguments require an inaccurate reading of § 27A(b).

Congress wrote § 27A(b) to prevent courts from applying *Lampf* to cases that plaintiffs filed before the Court rendered *Lampf*. Section 27A(b) states a specific procedure (motion for reinstatement within 60 days of enactment) to restart "[a]ny" § 10(b) claim "commenced on or before June 19, 1991 . . . which was dismissed as time barred" after *Lampf*, but "would have been timely filed" before *Lampf*.

What little legislative history exists for § 27A confirms that Congress intended to obliterate *Lampf* and *Beam* for all cases filed before the Court rendered *Lampf*.[6] *See*,

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[6] For a comprehensive treatment of the legislative history of § 27A, see Anthony Michael Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 Tulsa L.J. 23, 27-30 (1992).

e.g., 137 CONG. REC. S17382 (daily ed. Nov. 21, 1992) (Sen. Reigle, § 27A sponsor) ("The language of the bill is designed to return plaintiffs and defendants to exactly the position that they had on June 19, 1991," the day before the Court rendered *Lampf*.); *id.* at H11813 (daily ed. Nov. 26, 1991) (Rep. Markey) ("The language . . . unambiguously reverses the *Lampf* ruling's application of the 1-year and 3-year statute of limitations. . . ."). The Supreme Court itself has recognized as much. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 1993 WL 179262 at *5 ("Congress . . . limit[ed] the retroactive effect of [*Lampf* by directing] the applicable 'limitation period for any private civil action implied under [§ 10(b)] that was commenced on or before June 19, 1991. . . .'"); *id.* at *11 (Thomas, J., dissenting) (Congress "alter[ed] the retroactive effect of the 10b-5 limitations period that we adopted in *Lampf*."). We know of no evidence or reason that supports a narrower reading of § 27A. *Compare Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 689 (1983) (interpreting securities laws to "further[] their broad remedial purposes").

1. Time-Bar Dismissal

The TGX Defendants seize on the district court's statement that Simmons did not voluntarily dismiss his § 10 (b) claims under FED. R. CIV. P. 41 by asking the court to dismiss those claims without prejudice in August 1991. *Simmons*, 786 F. Supp. at 590. They argue that the court's statement is erroneous, and once we recognize that Simmons voluntarily dismissed his claims, we must hold that the claims were not "dismissed as time barred" under § 27A(b)(1).

But even if Simmons chose to dismiss his § 10(b) claims, the record conclusively establishes that he did so because *Lampf* rendered those claims time barred. The district court's August 1991 judgment states this very fact. We interpret "dismissed as time barred" in § 27A

(b) to include all cases that were dismissed because of *Lampf's* time bar. Simmons satisfies this but-for scrutiny.

2. Nullification

The TGX Defendants have found language in our cases in which this court states that the effect of a voluntary dismissal is to "put the plaintiff in the same legal position in which he would have been had he never brought the first suit." *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir. 1985). They would have us apply this language, irrespective of the reasons for and context in which we used it, to hold that Simmons's suit vanished upon voluntary dismissal, leaving nothing to reinstate by operation of § 27A(b).

But there is no rule that makes all voluntarily dismissed cases absolutely null for all purposes. This court has permitted a district court to resurrect a voluntarily dismissed case under FED. R. CIV. P. 60. *Boehm v. Office of Alien Property*, 344 F.2d 194 (5th Cir. 1965). And even if there were an absolute-nullity rule, we could not apply it in the face of contrary congressional intent unless we could articulate a constitutional basis for doing so. As we have explained, Congress intended broad relief from *Lampf* for any § 10(b) claim "that was commenced on or before June 19, 1991." Simmons commenced his § 10 (b) claims against the TGX Defendants on March 8, 1990, which places those claims within the ambit of § 27A(b).

3. Avoidance

The TGX Defendants cite cases holding that courts should refrain from deciding constitutional questions if possible. *See, e.g., Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 819 (D.C. Cir. 1974) ("[W]hen one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear

statement' of a contrary legislative intent."). They accompany these cites with creative readings of § 27A(b) that would avoid constitutional questions, while conveniently killing Simmons's claims.[7] None of their readings respects Congress' unmistakable intent to keep *Lampf* from operating retroactively in cases that were dismissed as time barred.[8] We will not ignore the obvious meaning of § 27A simply to avoid the constitutional questions that Congress has created.

4. Claim Preclusion

Finally, the TGX Defendants point to the district court's October 1991 dismissal of Simmons's amended counterclaim in the TGX suit. They argue that the court dismissed this amended counterclaim with prejudice, and the amended counterclaim raised the same claims that Simmons pursues through his January 1992 reinstatement motion under § 27A(b), so claim preclusion bars any reinstatement of Simmons's March 1990 claims regardless of § 27A(b).

But the TGX Defendants have waived any claim-preclusion argument by failing to raise it in the district

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[7] For example, the TGX Defendants suggest that Congress really accomplished nothing whatsoever in § 27A because the "laws applicable . . . as such laws existed on June 19, 1991," which § 27A directs courts to apply, are defined by the Securities Exchange Act of 1934, just as *Lampf* holds. They also suggest that § 27A only replaces the one-year limitations period discussed in *Lampf*, and does not affect *Lampf's* direction that § 10(b) actions be further limited by a three-year statute of repose.

The PMLI Defendants suggest that Congress only meant § 27A(b) to reinstate actions that were dismissed from a district court, but still pending on appeal at the time a party files a motion for reinstatement.

[8] *Cf. Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 809 (11th Cir. 1988) (Though Congress intended a statute to control cases "pending" before enactment of the statute, the court found no clear intent that the statute would apply to pending cases that a court had also finally dismissed.).

court. Our thorough search of the record reveals no mention of claim preclusion by the court's October 1991 judgment, and we refuse to consider it for the first time on appeal. *See Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (failure to present res judicata argument to district court usually prevents appellate court from addressing the issue); *see also Aluminum Prod. Distrib., Inc. v. Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1384 (10th Cir. 1977) (where a party asserted res judicata for the first time in a new-trial motion, "the district court was not bound by any [prior] judgment," and the appellate court refused to consider any preclusive effect on appeal).

We come to the central question of both cases: the constitutionality of § 27A(b).

B. Whether the Constitution Protects Individuals or the Judiciary From § 27A(b)

Congress' authority to establish limitations periods for securities-fraud claims cannot be disputed. *See Musick*, 1993 WL 179262 at *4-*5. Section 27A(b) is controversial exclusively for its retroactivity.[9] While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. Const. art. I, § 9; *Mahler v. Eby*, 44 S. Ct. 283, 286 (1924).

The PMLI Defendants and TGX Defendants (collectively Defendants) argue that the Supreme Court's precedent and the structure of the Constitution establish that § 27A(b) unconstitutionally affects individuals and the federal judiciary. The district courts agreed with them. We do not.

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[9] A retroactive statute "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960) (hereinafter *Constitutionality of Retroactive Legislation*).

1. Individual Rights

The Constitution's Fifth Amendment prohibits Congress from depriving any person of property without due process of law. The Defendants claim that § 27A(b) contravenes the Fifth Amendment by compromising two of their property rights as recognized by the Supreme Court.

a. The Right to a Final, Nonappealable Judgment

Each of the defendants in these cases (collectively Defendants) possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims. Unlike § 27A(a), § 27A(b) effectively nullifies these judgments, so the cases addressing the constitutionality of § 27A(a) have nothing to say about whether § 27A(b) unconstiutionally abrogates any right to a final judgment.[10] For guidance on this question, we turn to the Supreme Court.

The Defendants rely upon *McCullough v. Virginia*, 19 S. Ct. 134 (1898) and its progeny to argue that § 27A(b) cannot constitutionally take away their judgments. McCullough obtained a judgment against Virginia in 1892, but a Virginia appellate court reversed that judgment. *Id.* at 135. Between the time of judgment and its reversal, Virginia's legislature repealed the statute that authorized McCullough's suit. When the Supreme Court agreed to hear McCullough's appeal, Virginia asked the Court to apply the new law repealing authorization for the suit and

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[10] The only appellate courts to rule on the constitutionality of § 27A to date have upheld it as a means of changing the limitations period in *pending* § 10(b) cases. *Cooke v. Manufactured Homes, Inc.*, 1993 WL 248257, at *8 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 1993 WL 156464, at *3 & n.11 (1st Cir. May 19, 1993); *Berning v. A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray*, 989 F.2d at 1574; *Anixter v. Home-State Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir. 1992); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1570 (11th Cir. 1992).

dismiss McCullough's appeal. *Id.* at 142. The Court emphatically refused Virginia's request:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id.[11]

Our research indicates that the Court has never applied this holding in *McCullough* to decide another case. Moreover, both before and after *McCullough*, the Court has decided cases with identical relevant facts according to a different rule.[12] Accordingly, we must carefully scrutinize

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[11] Before *McCullough*, the Court did not adhere to such an absolute rule. *See Freeland v. Williams*, 9 S. Ct. 763, 767-68 (1889) (sustaining a state law which invalidated a final judgment for damages in a trespass action); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855) (accepting "*as a general proposition* . . . especially as it respects adjudication upon the private rights of parties," that legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff") (emphasis added).

[12] In *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), Chief Justice Marshall explained:

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110. Almost two hundred years later, *Schooner Peggy* remains good law. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1581-82 (1990) (Scalia, J., concurring) (reciting history of the Court's adherence to *Schooner Peggy* while advocating a rule requiring a clear manifestation of legislative intent before courts will recognize retroactive legislation); *see also*

McCullough's rationale in assessing the precedential value of its broad statement concerning rights vested by judgment.

The *McCullough* Court did not explicitly ground its holding in the Constitution. In subsequent decisions, however, the Court explained that the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments, including the one that belonged to McCullough. *E.g., Hodges v. Snyder*, 43 S. Ct. 435, 436 (1923). Thus, we decide this case according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation. The Defendants stress a "vested rights" theory exemplified by *McCullough*, but we find talk of vested rights to merely state due process conclusions, and thus unnecessarily confusing. The Court explains:

> the words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some

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Griffith v. Kentucky, 107 S. Ct. 708, 712 n.6 (judgment is final for purposes of the constitutional prohibition on retroactive criminal legislation only when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). But in *McCullough*, the Court ignored *Schooner Peggy* and the fact that McCullough's case was pending on appeal when Virginia's legislature changed the law, deciding instead that the law applicable to a case "freezes" at the time the trial court renders its judgment. 19 S. Ct. at 142 ("The writ of error to the court of appeals of [Virginia] brought the validity of [the trial court's] judgment into review, and the question presented to that court was whether, *at the time it was rendered*, it was rightful or not.") (emphasis added). The *McCullough* Court may have understood *Schooner Peggy* to apply only to Article III courts, and ignored it for this reason.

> more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 6 S. Ct. 209, 213 (1885). A seminal treatise recognizes what has happened when courts have departed from the Constitution in search of an amorphous "vested rights" theory:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."

NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.05, at 364-65 (C. Sands 4th ed. 1986); *accord Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. at 696. We waste no further time with the "vested rights" language, and turn to due process.

When the Court rendered *McCullough*, it may have held the absolutist view, indicated by the statement quoted above, that the Due Process Clause protects all final judgments from retroactive legislation. But the Court has retreated from this view. The Court permits retroactive legislation to annul private judgments that affect public rights, *Hodges*, 43 S. Ct. at 436, or private injunctions upon changed circumstances. *System Federation No. 91, Ry. Employees' Dept., AFL-CIO v. Wright*, 81 S. Ct. 368, 371 (1961) (modifying a permanent injunction to conform with subsequently-enacted amendments to the Railway Labor Act). The dispositive retreats from any absolute *McCullough* rule, however, come in *Fleming v. Rhodes*, 67 S. Ct. 1140 (1947) and *Usery v. Turner Elkhorn Mining Co.*, 96 S. Ct. 2882 (1976).

In *Fleming*, landlords obtained valid final judgments from a Texas court entitling them to evict certain tenants upon the lapse of wartime price regulations. Congress cured the lapse within two months, and included a law which prohibited the eviction of the tenants with its extension of price regulations. 67 S. Ct. at 1141 n.3. A price-control administrator asked a federal district court to apply this law to enjoin the landlords and state officials from executing their judgments, but the district court held that the federal statute violated the Fifth Amendment's Due Process Clause. *Id.* at 1141-42. The Supreme Court reversed, explaining that

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." *The rights acquired by judgments have no different standing.* The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the [administrator] notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Id. at 1144 (footnotes omitted and emphasis added), *cited with approval in Federal Housing Admin. v. Darlington, Inc.*, 79 S. Ct. 141, 146 & n.6 ("[A]ny 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.").

Usery arose from Congress' efforts to provide compensation to coal miners and their survivors. The disputed legislation establishes an administrative procedure under

which victims of the disease known as "black lung" and their survivors may collect benefits from coal companies, mandates certain presumptions against the coal companies, and operates retroactively. 96 S. Ct. at 2889-90. The companies argued that the statute unconstitutionally deprived them of their property because it imposed upon them "an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." *Id.* at 2892. The Court responded:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . .
>
> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect. . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming v. Rhodes*. . . .

Id. at 2892-93 (citations and footnotes omitted). The Court then assessed the practical consequences of the Act's retrospective imposition of liability and concluded that this imposition "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . ." *Id.* at 2893.

The Defendants would have us distinguish *Fleming* and *Usery* on the ground that the Court in neither case per-

mitted a retroactive statute to upset a final, nonappealable judgment; they maintain that the rights created by judgments are sacrosanct above other due process rights, and that the *McCullough* rule endures for judgment-based rights. This argument fails to distinguish *Fleming* or *Usery*.

While the *Fleming* Court noted that the retroactive legislation which it upheld only compromised the landlords' ability to *enforce* their judgment rights as opposed to any compromise of the rights themselves, 67 S. Ct. at 1144, the Court has also recognized (as do we) that the removal of a remedy has the same effect as the removal of a right. *See Chase Sec. Corp. v. Donaldson*, 65 S. Ct. 1137, 1142 (1945) ("[I]t is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion."); *Lynch v. United States*, 54 S. Ct. 840, 844 (1934) ("Contracts between individuals or corporations are impaired . . . whenever the right to enforce them is taken away or materially lessened.").

Usery teaches that Congress can, under some circumstances, create private civil liability for past acts. We recognize nothing in the *Usery* Court's analysis that would limit Congress from retroactively creating liability for securities fraud if it justified this retroactive effect with reasons comparable to those recited in *Usery*. *See* 96 S. Ct. at 2893-94. Because *Usery* allows Congress to avert questions of judgment rights altogether, there is no due process reason why Congress cannot reach the same result by upsetting a judgment.

Moreover, FED. R. CIV. P. 60(b) itself destroys the Defendants' position that final, nonappealable judgments confer sacrosanct due-process rights on individuals. Rule 60(b) permits courts to "relieve a party . . . from a final judgment . . . for . . . any . . . reason justifying relief from the operation of the judgment." The Court has repeatedly acknowledged that Rule 60 "provides courts with authority 'adequate to enable them to vacate judg-

ments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988) (citation omitted). The Tenth Circuit is especially likely to disturb final judgments under Rule 60(b) upon subsequent changes in the law: "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989).

Rule 60(b) has spawned an extensive jurisprudence; no doubt remains as to its constitutionality. And we know of nothing to indicate that an individual holds any greater constitutional right against one branch of government than she holds against another. This reasoning establishes that, despite *McCullough*, judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation.

It is not our place to state general rules as to when the Due Process Clause permits Congress to disturb judgments. We limit our inquiry to the facts before us. Fortunately, the Court provides ample guidance in *Donaldson*. *See* 65 S. Ct. at 1141-43.

Donaldson sued a securities broker under Minnesota statutory and common-law fraud theories. A state judge ruled that the broker violated the Minnesota securities statute and that Donaldson timely filed his claim because his absence from the state tolled Minnesota's limitations period. Minnesota's Supreme Court held the latter ruling erroneous, and remanded for further proceedings. *Id.* at 1138. Meanwhile, Minnesota's legislature enacted a limitations statute which permitted any securities fraud claim to be brought within one year of the statute if the securities were delivered more than five years before the statute's enactment date. Donaldson met the five year delivery requirement and availed himself of the new statute in Minnesota's courts. *Id.* at 1139. The broker appealed to the Supreme Court, arguing that Minnesota deprived

him of due process by applying the new limitations period to him. We quote extensively from the Court's unanimous refutation of this argument because we find it applicable here:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> . . . .
>
> . . . . The Fourteenth Amendment [Due Process Clause] does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change

> foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication.

Id. at 1142-43 (citations and footnotes omitted).

The Defendants understandably stress the last phrase of the quoted passage, and observe that while *Donaldson* permits a legislature to retroactively change limitations periods, it says nothing about whether a legislature can divest a party of a final judgment. The problem with this argument is that *Donaldson* predates both *Fleming* and *Usery*, which we understand to establish that Congress may upset final judgments under some circumstances. To decide whether § 27A(b) can constitutionally upset final judgments, we observe that the Court in *Donaldson*, *Fleming*, and *Usery* invariably considered *whether the legislature acted rationally toward the party asserting a due process violation* to determine whether retroactive legislation deprived those parties of rights without due process.[13]

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[13] Even before *Usery*, one commentator comprehensively surveyed the Court's decisions concerning the constitutionality of retroactive legislation, and concluded that three inquiries, none of them dispositive, inform the Court's rationality decisions: 1) the nature of the public interest served by the retroactive enactment; 2) the extent of the abrogation of the preenactment right; and 3) the nature of the right affected by a retroactive statute. *Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. at 697,

In *Fleming*, the Court understood the landlords asserting due process rights to have taken advantage of an inadvertent two-month lapse in price-control regulation of defense-area housing during wartime, and held that Congress could rationally exercise its commerce authority to deny them this advantage. 67 S. Ct. at 1143-44. In *Usery*, the Court analyzed the effect of the retroactive legislation on the coal companies to determine whether the legislation "me[t] the test of due process" and concluded that the legislation was "justified as a rational measure to spread the costs of the employees' disabilities." 96 S. Ct. at 2893. Likewise, as we quote above, the *Donaldson* Court carefully considered the effect of the retroactive limitations statute on the broker before holding that Minnesota's legislature worked no injustice. 65 S. Ct. at 1143. And recently, the Court upheld a statute that retroactively assessed a fee for use of the Iran-United States Claims Tribunal against a due process challenge by applying this standard: "the test of due process" for "[t]he retroactive aspects of legislation" is met if "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2718 (1984)).

711, 717. He considers a statute that retroactively upsets final judgments primarily under the third criteria, and explains:

> the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remembered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application. Such a case was *Fleming v. Rhodes* . . . .

Id. at 718-19.

Donaldson frees us from speculating as to the bounds of due-process rationality when a legislature promulgates retroactive laws. Like the statute at issue in *Donaldson*, § 27A(b) restores a remedy that PMLI and Simmons lost through lapse of time. Like the fraud-based cause of action at issue in *Donaldson*, the Defendants' conduct would not have been different if they would have foreseen § 27A(b). Like the effect of the retroactive legislation at issue in *Donaldson*, § 27A(b) subjects the Defendants to a lawsuit.

As a matter of practical effect on the parties, § 27A(b) differs from the *Donaldson* legislation in one important respect. The *Donaldson* Court characterized the broker's expectation that the limitation law would remain as it was when suit was filed as a "legitimate hope[]," yet held this expectation insufficient to render Minnesota's retroactive limitations statute violative of due process. *Id.* Section 27A(b) represents Congress' complementary view that courts should honor the expectations of plaintiffs and defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*. Section 27A(b) fulfills the hopes that the *Donaldson* Court found legitimate, and is thus a stronger candidate for retroactivity than the statute upheld by the Court; strong enough, we hold, to upset the Defendants' final, nonappealable judgments.[14]

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[14] By this statement, we recognize that § 27A(b) should survive any heightened scrutiny required for retroactive legislation that upsets a judgment. We do not imply that retroactive legislation necessarily receives heightened scrutiny if it upsets a final judgment. A judgment for money is a species of property right, and we see no reason why the Constitution accords any more protection to an individual's right to her money when this right is represented by a judgment than when this right is represented by a savings passbook. *See Tonya K. by Diane K. v. Board of Educ. of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("Once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."). The Supreme Court, this court, and others have consistently per-

b. The Right to a Statute of Repose

The Defendants argue that even if Congress can legitimately upset their judgments with § 27A(b), the statute still contravenes due process because it creates civil liability for past acts. Their argument rests on *William Danzer & Co. v. Gulf & S.I.R. R.*, 45 S. Ct. 612 (1925), where the Court distinguishes between time-bar statutes that bar the *remedy* of suit in court, and those that extinguish the *liability* altogether. *Id.* at 613; *see also Donaldson*, 65 S. Ct. 1141 n.8 (distinguishing *Danzer* according to its remedy/liability dichotomy). If a time-bar statute extinguishes liability, the *Danzer* Court held that a legislature cannot constitutionally amend such a statute to revive liability once extinguished. 45 S. Ct. at 613. To do so would "retroactively . . . create liability" and thus "deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

The Defendants point to the *Lampf* Court's distinction between a one-year statute of limitation and a three-year statute of repose, and its holding that Congress effectively created this time-bar structure in 1934. *See* 111 S. Ct. at 2780. They observe that, like the statute at issue in *Danzer*, the three-year repose period recognized by the *Lampf* Court is an absolute bar not subject to equitable tolling. *Compare id.* at 2782 *with Danzer*, 45 S. Ct. at 613. From this, they reason that Congress in 1934 enacted an absolute three-year limit *on liability* for § 10(b) violations. Because § 27A(b) operates in these cases to

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mitted legislatures to retroactively affect individuals' rights to money by applying a rationality standard. *See Sperry*, 110 S. Ct. at 396-97; *Pension Benefit Guar. Corp.*, 104 S. Ct. at 2718; *Usery*, 96 S. Ct. at 2893; *Wright v. Union Central Life Ins. Co.*, 58 S. Ct. 1025, 1031-34 (1938); *Hoffman v. City of Warwick*, 909 F.2d 608, 618-19 (1st Cir. 1990); *Fust v. Arnar-Stone Lab., Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984); *DiPippa v. United States*, 687 F.2d 14, 19 (3d Cir. 1982).

lift this three-year outside limit, the Defendants argue that the statute "retroactively . . . creates liability" in contravention of due process according to *Danzer*.

As a preliminary matter, we note that the *Usery* Court squarely held that Congress may retroactively create liability for past acts, and thus compromises *Danzer's* holding that such legislation *per se* contravenes due process. *See Usery*, 96 S. Ct. at 2893 (legislation is not unlawful solely because "the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted). The Court has also questioned the continued validity of a dichotomy between remedy and right, at least where extinction of the remedy has the same effect as extinction of the right. *See Donaldson*, 65 S. Ct. at 1142; *see also Lynch*, 54 S. Ct. at 844. And the last time a party asked the Court to apply *Danzer*, the Court did not even make a determination as to whether the time-bar statute at issue affected remedy or liability. *International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 97 S. Ct. 441, 450-51 (1976).

But even if *Danzer* remains good law, it does not help the Defendants. *Danzer* and its progeny are inapposite to statutes that bar remedies, while leaving liability intact. We need look no further than *Lampf* to determine whether the three-year statute of repose asserted by the Defendants bars liability.

The *Lampf* Court strove for crystal clarity in stating its holding: "[T]he governing standard for an action under § 10(b) [is] the language of § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e)." 111 S. Ct. at 2782 n.9. Section 9(e), as passed by Congress in 1934, provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

This language unequivocally bars an action to enforce a liability, and says nothing about the continued existence of that liability. Nowhere does the *Lampf* Court even imply that the absolute three-year statute of repose extinguishes liability under § 10(b). We hold that it does not.

This holding conflicts with the Tenth Circuit's holding in *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991) that § 13 of the 1934 Act limits liability and not remedy. The *Lampf* Court relied upon § 13 to hold that § 9(e) governs § 10(b) limitations periods, yet mentioned nothing about limitation of liability. 111 S. Ct. 2780 & n.7. And like § 9(e), the language of § 13 unequivocally indicates a limitation of remedy, not of liability.[15] We disagree with the *Anixter* court's opposite conclusion.

The Defendants wrongly assume that a statute of repose must go to liability rather than remedy. *See City of El Paso v. Simmons*, 85 S. Ct. 577, 582 n.9 ("[T]he statute of repose challenged here is an alteration of remedy rather than obligation."). They are also mistaken that a time-bar statute limits liability merely because a legislature structures it as an absolute bar that is not subject to equitable tolling. In *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), the court discussed § 13 as follows:

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to say that equitable tolling and related doc-

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[15] Section 13 provides:

> In no event shall any such action be brought to enforce a liability created under § 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under § 77*l*(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

> trines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.

Id. at 1391 (citations omitted). Rather than assess whether a statute is characterized as one of repose or limitation, or whether it is subject to equitable tolling, the relevant inquiry under *Danzer* is whether the legislature intended liability or remedy to be extinguished by a time bar. *Donaldson*, 65 S. Ct. 1141 n.8. The primary evidence of this intent is, of course, the language of the statute.[16] In this case, we understand Congress to have decided in § 9(e) that the three-year time bar goes to remedy only.

Accordingly, the Defendants have failed to establish that § 27A(b) unconstitutionally deprives them of any right.

2. *Judicial Authority*

The Defendants next invite us to strike § 27A(b) as an affront to our Article III authority even if it does not contravene their constitutional rights. Other courts have considered some of the exact arguments made by the Defendants, and we draw on their wisdom before reaching the Defendants' novel contentions.

a. *Beam* and *Klein*

The Defendants present the same *Beam* argument that the district court describes in *Simmons*, 786 F. Supp. at 592-94, and the Ninth Circuit describes in *Gray*, 989 F.2d at 1571-72. We adopt the Ninth Circuit's analysis rejecting this argument insofar as it explains why any constitu-

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[16] The Ninth Circuit has distinguished *Danzer* by applying a presumption that time bar statutes "go to matters of remedy only." *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982).

tional rule articulated in *Beam* does not limit Congress' powers under Article I. *Id.* at 1572; *accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 277-78. The Defendants also argue that § 27A(b) affects the outcome of cases without changing the law in violation of the rule announced in *United States v. Klein*, 80 U.S. 128 (1871). We adopt the analysis of the Eleventh Circuit in *Scientific-Atlanta*, 971 F.2d at 1572, which explains that § 27A respects *Klein* by changing the law. *Accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 278-79; *Gray*, 989 F.2d at 1568-70; *Anixter*, 977 F.2d at 1544-46.

b. Pure Retroactivity

The Defendants also contend that Article I does not confer authority upon Congress to enact purely retroactive legislation. We view such a blanket prohibition as tantamount to a civil Ex Post Facto Clause, something that the Court has explicitly refused to recognize. *See Galvan v. Press*, 74 S. Ct. 737, 743 n.4 ("The Court . . . has undeviatingly enforced the . . . position, first expressed in *Calder v. Bull*," that "the *ex post facto* Clause applies only to prosecution for crime. . . . It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.") (citation omitted); *cf. Cummings v. Bostwick*, 481 F. Supp. 1251, 1254 & n.6 (D. N.H. 1980) (the constitutions of Colorado, Georgia, Idaho, Missouri, New Hampshire, Ohio, Tennessee and Texas explicitly prohibit all retroactive legislation).

To the contrary, the Court has held that a statute is not unconstitutional merely for its retroactivity. *See Usery*, 96 S. Ct. at 2893; *see also Scientific-Atlanta*, 971 F.2d at 1573 (rejecting argument that § 27A transgresses separation of powers doctrine because it is purely retroactive). The Defendants do not adequately distinguish *Usery* by explaining that the statute at issue in that case had some prospective effect. The *Usery* Court nowhere predicates

its blessing of retroactive legislation on an associated prospective component. Indeed, the Court has before upheld purely retroactive legislation against a separation-of-powers challenge. *See United States v. Sioux Nation of Indians*, 100 S. Ct. 2716, 2745 (1980). The Constitution imposes no bar on purely retroactive legislation *per se*.

c. Final Judgments

Lastly, the Defendants assert that § 27A(b) unconstitutionally usurps judicial authority by upsetting final judgments.[17] They say that § 27A(b) places Congress in the position of a super-appellate court, exercising review authority over the Supreme Court and its decisions in *Lampf* and *Beam*.

To define the constitutional separation of legislative and judicial authority, the Court focuses upon "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3257 (1986). Under this standard, we find § 27A (b) harmless.

With § 27A(b), Congress did not overrule decisions of the Supreme Court. As we have held through *Scientific-Atlanta*, Congress changed the law after final judgment in *Lampf* and *Beam*, giving plaintiffs a new right to assert in court through a reinstatement motion. The Defendants understandably claim a violation of *their* constitutional rights by this action, but § 27A(b) takes no authority from the judiciary. Most significantly, § 27A(b) leaves the final resolution of securities-fraud disputes to the courts—we will decide, indeed are here deciding, which controversies will end in dismissal despite § 27A(b). If we understood a statute's purpose to be the reversal of results in particular controversies between private individ-

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[17] The Ninth Circuit pretermitted this question in *Gray*. *See* 989 F.2d at 1571.

uals, we would strike the statute as violative of our authority to decide cases. *See, e.g., United States v. O'Grady*, 89 U.S. 641, 648 (1875) (finding that the Treasury Secretary invaded judicial authority by offsetting a court's judgment with claimed, but unlitigated tax liability). But § 27A(b) is innocent on this score.

By upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done. In *Sioux Nation*, the Court held that the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done.

The Sioux Nation brought a Fifth Amendment takings claim against the United States because our government breached a treaty obligation to reserve the Black Hills of South Dakota to the Sioux. The United States Court of Claims dismissed the Sioux Nation's claim for interest on the value of the seized property as barred by res judicata. *United States v. Sioux Nation of Indians*, 518 F.2d 1298, 1306 (Ct. Cl. 1975). The Supreme Court denied certiorari. 96 S. Ct. 449 (1975). Three years later, Congress directed the Court of Claims to review the claim's merits without consideration of res judicata. *See* 25 U.S.C. § 70s(b); 100 S.Ct. at 2727. After the Court of Claims ruled in favor of the Sioux Nation, the government appealed, asserting that § 70s(b) violates the constitutional separation of legislative and judicial authority. The Court upheld § 70s(b), permitting Congress to say that a controversy continues after the Court has said that it does not. 100 S. Ct. at 2735-36; *see also Tonya K.*, 847 F.2d at 1247 (citing *Sioux Nation* for the proposition that "Congress may invite a court to reconsider even when it may not dictate the outcome").

Schooner Peggy and its extensive progeny also represent compelling evidence that the Constitution permits

Congress and the judiciary to share authority in deciding when a court is finished deciding a particular controversy between individuals. *See* 5 U.S. (1 Cranch) at 110. With the exception of *McCullough*,[18] the Court has repeatedly observed Chief Justice Marshall's admonition that appellate courts must decide cases according to the law that exists when they decide, not the law that existed when the lower court rendered its decision.

In an extreme and stringent application of this rule, the Court rendered *149 Madison Avenue Corp. v. Asselta*, 67 S. Ct. 1726, *modifying*, 67 S. Ct. 1178 (1947). The *149 Madison Avenue* Court had affirmed a judgment for overtime pay due plaintiffs. 67 S. Ct. at 1184. But before the time for rehearing had run, Congress retroactively created a defense for the defendants, who asked the Court to reconsider its affirmance in light of the change in law. The Court changed its judgment from an affirmance to a remand so that the district court could consider the case in light of the new law. 67 S. Ct. at 1726. The district court eventually entered judgment for the defendants. *Asselta v. 149 Madison Ave. Corp.*, 90 F. Supp. 442 (S.D.N.Y. 1950).

Of course, the rule announced in *Schooner Peggy* does not depend on whether the intervening law helps a particular party. Courts must apply the new law regardless of whether it ends a case that the court otherwise would have remanded for further proceedings. Thus, we interpret *Schooner Peggy* to support the constitutional proposition that Congress and the judiciary share authority to decide when the judiciary's word on a controversy is its last.

The Defendants have articulated no constitutional reason why these controversies should not continue.

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[18] *See* note 12, *supra*.

III. CONCLUSION

We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

APPENDIX B

[Filed Aug. 25, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3375

TGX CORP.,
Plaintiff,

versus

GLORIA ANNETTE TURNER SIMMONS, *et al.*,
Defendants-Appellants,
Cross-Appellees,

versus

GREENWICH INSURANCE COMPANY, *et al.*,
Defendants-Appellees,
Cross-Appellants.

GAYLON D. SIMMONS, *et al.*,
Plaintiffs-Appellants,
Cross-Appellees,

versus

J.C. TEMPLETON, *et al.*,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 25, 1993)

Before Politz, Chief Judge, Reavley and Barksdale, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby deny.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX C

MINUTE ENTRY
BEER, J.
MAY 20, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION M

TGX CORPORATION

versus

GAYLON D. SIMMONS, *et al.*

Consolidated With

Civil Action No. 90-0849

SECTION M

GAYLON D. SIMMONS, *et al.*

versus

J.C. TEMPLETON, *et al.*

Plaintiffs in Civil Action 90-0849 previously filed a motion to reinstate their dismissed federal and state law claims, pursuant to section 27(A) of the 1934 Securities Exchange Act. In a minute entry dated March 18, 1992, the court denied plaintiffs' motion on the grounds that section 27(A) violates the separation of powers. Plaintiffs thereafter filed a "Motion for New Trial or, alternatively, for Relief Pursuant to Rule 59." Said motion was heard on May 6, 1992, with the parties and the government each making oral presentations. The court then

afforded all sides the opportunity to supplement their oral presentations with written memoranda. The deadline for submitting said memoranda has now passed, and accordingly the court now rules as follows.

I. *Background*

The factual background to this motion was presented in the court's March 18 minute entry. The only development since that date is that the court entered a final judgment dismissing plaintiffs' state claims on March 23, 1992.

II. *Law and Analysis*

Plaintiffs' motion is hereby denied. In addition to its prior ruling,[1] the court believes section 27(A)(b) violates due process by legislatively authorizing the upset of final judgments.[2]

Section 27(A)(b) impermissibly authorizes the upset of final judgments. Section 27(A)(b) authorizes the reinstatement of previously-dismissed actions upon timely motion, provided certain prerequisites are satisfied. Reinstatement is authorized regardless of whether a final judgment has been entered in the underlying action. This failure to distinguish between cases with and without final judgments causes section 27(A)(b) to run afoul of established due process principles.

It is well-settled that Congress cannot upset a final judgment. The legislature may not "take away rights

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[1] For reasons stated in its March 18 minute entry, the court maintains its belief that section 27(A) violates the separation of powers. The remainder of this minute entry addresses section 27(A)'s due process implications, an issue explicitly not addressed in the court's prior ruling. *See* March 18 minute entry, at n. 4.

[2] This issue could likewise be considered a separation of powers problem, to the extent it concerns Congress' attempt to undercut the judiciary. Whether it is characterized as a separation of powers or due process problem, however, does not alter the court's ultimate determination that section 27(A)(b) is unconstitutional.

which have once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898). *See also State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) ("the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby. . . . When they have passed into judgment, the right becomes absolute . . . ."); *Massingill v. Downs*, 48 U.S. (7 How.) 760, 767 (1849) ("no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment.").

The aforestated precedents make clear that final judgments give rise to vested rights, and that Congress cannot divest successful litigants of said rights. Movants contend that final judgments entered on litigants' behalves are not fully protected as a result of the passage of section 27(A)(b). Ultimately, such contentions must fail. The government concedes in its brief that the Supreme Court "has yet to decide whether a dismissal on statute of limitations grounds gives rise to vested rights." *Statement of Interest of the United States and the Securities and Exchange Commission* at n.6. Until the Supreme Court says otherwise, this court will follow the aforestated precedent, and decline movants' invitation to prioritize the sanctity of final judgments based on the legal reasoning underlying their origin.[3]

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[3] This court thus joins at least three other district courts which have denied motions to reinstate because section 27(A)(b) impermissibly upsets final judgments. *See Johnston v. CIGNA Corp.*, No. 90-B-177, at p. 3 (D. Colo. Mar. 20, 1992) ("because [section 27A(b)] calls for the reinstatement of claims finally adjudicated, it is unconstitutional as applied here"); *In re Brichard Securities Litigation*, No. 87-2987, 1992 WL 63399, at *9 (N.D. Cal. Mar. 27,

III. *Conclusion*

It is hereby ADJUDGED, ORDERED and DECREED that plaintiffs' "Motion for New Trial or, alternatively, for Relief Pursuant to Rule 59" is DENIED.

/s/ Peter Beer
PETER BEER
United States District Judge

1992) ("Congress does not have the power to upset the final judgments of either the Supreme Court or the lower federal courts. . . . [Section 27A(b)] intrudes upon the exclusive power of the judiciary to adjudicate cases." (citations omitted)); *Plaut v. Spendthrift Farm, Inc.*, No. 87-438, at pp. 7-8 (D. Ky. Apr. 13, 1992) ("When a judgment becomes final, it is final for all purposes, regardless of its basis. . . . This court must conclude that § 27A(b) is an unconstitutional exercise of legislative power, and cannot be permitted to interfere with defendants' final judgment and their vested rights therein.").

APPENDIX D

[Filed March 23, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 87-5298

SECTION M
JUDGE BEER

MAGISTRATE DIV. 2
MAGISTRATE WYNNE

TGX CORPORATION

versus

GAYLON D. SIMMONS AND
ANNETTE TURNER SIMMONS

Consolidated With

Civil Action Number 90-0849

SECTION M
JUDGE BEER

MAGISTRATE DIV. 2
MAGISTRATE WYNNE

GAYLON D. SIMMONS AND
ANNETTE TURNER SIMMONS

versus

J. C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W. A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY AND WILLIAM M. TEMPLETON

FINAL JUDGMENT AND ORDER

Considering the record, the memoranda and arguments of counsel and this Court's Minute Entry of March 18, 1992; and upon finding no just reason for delay in the entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The motion of Gaylon D. Simmons and Gloria Annette Turner Simmons to reinstate their previously dismissed claims in Civil Action No. 90-0849 is hereby denied;

2. All state law claims plead against J. C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W. A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, William Templeton, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Company and Continental Insurance Company in Civil Action No. 90-0849 are hereby dismissed.

New Orleans, Louisiana, this 23rd day of March, 1992.

/s/ Peter Beer
PETER BEER
Judge

APPENDIX E

MINUTE ENTRY
BEER, J.
MARCH 18, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION M

TGX CORP.

versus

GAYLON SIMMONS, *et al.*

Consolidated With

Civil Action No. 90-0849

SECTION M

GAYLON SIMMONS, *et al.*

versus

J.C. TEMPLETON, *et al.*

Plaintiffs in civil action 90-0849 have filed a motion to reinstate their previously dismissed claims. Plaintiffs' motion was heard on February 19, 1992. Defendants' opposition to plaintiffs' motion involves a constitutional challenge to a Congressional statute. Consistent with Local Rule 1.10, the court has therefore withheld ruling until the Attorney General has had an opportunity to address the constitutional issues presented. The Attorney General has now notified the court that it does not wish to inter-

vene in this matter. Accordingly, the court now rules as follows:

I. BACKGROUND

In November 1986, the Simmons sold their full interest in LEDCO, Inc., to TGX Corp. (TGX) for approximately $21,000,000. The Simmons received $11,000,000 in cash; 300,000 shares of preferred TGX stock, valued at approximately $3,000,000; real property; forgiveness of a $1,000,000 debt they owed to LEDCO; and, deferred consideration of $5,000,000 plus interest, to be paid in annual installments.

The Simmons contend that, because the TGX stock has proven worthless and none of the deferred payments has been made, they have received only $13,000,000 instead of the expected $21,000,000. The Simmons claim their $8,000,000 in damages was caused by their reliance on TGX's financial statements in agreeing to the LEDCO sale. The Simmons claim the statements did not disclose the existence of a lawsuit pending against TGX, which caused the devaluation of TGX stock and rendered TGX unable to honor its deferred payment obligations. TGX was eventually forced into bankruptcy.

TGX sued the Simmons in 1987 ("1987 suit"), and the Simmons counterclaimed alleging violations of the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act") and Louisiana Blue Sky law. The suit was automatically stayed when TGX filed for bankruptcy in February 1990. On March 8, 1990, the Simmons filed suit against TGX's individual directors, and its law and accounting firms ("1990 suit"), alleging violations of section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and Louisiana Blue Sky law, as well as post-sale tortious interference with contract and breach of fiduciary duties.

The individual directors and TGX's law firm immediately moved to dismiss the 1990 suit, claiming the Sim-

mons' federal claims were time-barred by *Lampf v. Gilbertson*, 111 S.Ct. 2773 (1991). The Court in *Lampf* borrowed from another section of the 1934 Act and held that private actions under section 10(b) of the 1934 Act, and Rule 10b-5 promulgated thereunder, are subject to a one-year-from-discovery statute of limitations and a maximum three-year-from-transaction period of repose. *Id.* at 2780-81.

The Simmons thereafter admitted that *Lampf* time-barred their 1990 suit. Based on this admission, the court ordered defendants to prepare an order of dismissal and judgment. Before judgment was entered, however, the Simmons filed a motion to amend their counterclaim in the 1987 suit so as "to assert identical claims against the named defendants dismissed in the Proposed Order." The Simmons were concerned that entry of judgment in the 1990 suit would pose a res judicata bar to their proposed Fifth Amended Counterclaim in the 1987 suit. The Simmons therefore urged the court to dismiss their federal claims from the 1990 suit without prejudice. The court agreed, issuing a minute entry on August 5, 1991, dismissing the section 10(b) and Rule 10b-5 claims from the 1990 suit without prejudice. In a minute entry dated October 16, 1991, the court dismissed the Simmons' state law claims from the 1990 suit, also without prejudice.

On November 27, 1991, Congress passed S. 543, a bill which amends the 1934 Act by adding section 27(A), 15 U.S.C. section 78(aa). Section 27(A) provides, inter alia, a 60-day period for reinstating section 10(b) claims which had previously been dismissed as time-barred under *Lampf*. The president signed S. 543 into law, P.L. 102-242, on December 19, 1991. Based on section 27(A), the Simmons now seek to reinstate the 10(b) and 10b-5 claims previously dismissed from their 1990 suit and, based

thereon, seek reinstatement of their allegedly pendent state claims as well.[1]

II. LAW AND ANALYSIS

Plaintiffs' motion is hereby DENIED. Although plaintiffs satisfy the facial requirements for reinstatement under section 27(A), section 27(A) violates separation of powers principles by contravening the constitutional mandate established in *James B. Beam Distilling Co. v. Georgia.* 111 S.Ct. 2439 (1991).

A. *Section 27(A) Analysis*

Plaintiffs satisfy the facial requirements for reinstatement under section 27(A).[2] Section 27(A)(b) is herein specifically at issue, as this court dismissed plaintiffs' sec-

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[1] Technically, a judgment has never been entered dismissing plaintiffs' state claims from the 1990 suit. As stated in the conclusion to this minute entry, counsel for defendants are therefore jointly requested to submit a judgment dismissing plaintiffs' state claims.

[2] Section 27(a) amends the 1934 Act as follows:

> Sec. 27a. (a) *Effect on Pending Causes of Action*—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed in June 19, 1991.
>
> (b) *Effect on Dismissed Causes of Action*—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

tion 10(b) and Rule 10b-5 claims on August 5, 1991. A plaintiff seeking reinstatement under section 27(A)(b) must prove (1) that he commenced a private civil action under section 10(b) before June 19, 1991; (2) that said action was dismissed as time-barred subsequent to June 19, 1991; and (3) that said action was timely filed under the limitations period applicable in the jurisdiction on June 19, 1991. Plaintiffs herein satisfy these requirements.

The First and Second Requirements: Plaintiffs satisfy the first and second requirements for reinstatement under section 27(A)(b). Plaintiffs satisfy the first requirement for reinstatement because they filed their action under section 10(b) prior to June 19, 1991. Plaintiffs filed their complaint in civil action 90-0849 on March 8, 1990. Plaintiffs also satisfy the second requirement for reinstatement because their action under section 10(b) was dismissed as time-barred after June 19, 1991. Statements from the bench in open court, and the court's judgment and order, demonstrate that plaintiffs' section 10(b) claims were dismissed because they were time-barred.

Defendants err when they claim plaintiffs voluntarily dismissed their section 10(b) and Rule 10b-5 claims. Defendants filed a motion to dismiss said claims immediately after the Court issued *Lampf*. Plaintiffs opposed defendants' motion. Plaintiffs' thereafter withdrew their opposition, as it became clear that *Lampf* time-barred their claims. The court then dismissed plaintiffs' claims in open court, and ordered defendants to submit a conforming order and judgment. Defendants submitted a judgment which dismissed plaintiffs' claims with prejudice. Plaintiffs asked that the judgment be amended to dismiss their claims without prejudice, so as to avoid res judicata effects concerning a pending amendment to their counterclaim in the 1987 suit. The court granted plaintiffs' request, and dismissed their federal claims without

prejudice. The court's minute entry, and the documents concerning it, do not mention voluntary dismissal under Federal Rule of Civil Procedure 41.

Plaintiffs thus satisfy the first and second requirements for reinstatement under section 27(A)(b).

The Third Requirement: Plaintiffs also satisfy the third requirement for reinstatement under section 27(A)(b), because their action was timely-filed under the laws of this jurisdiction as they existed on June 19, 1991. Before *Lampf*, this jurisdiction applied the two year limitations period set by Louisiana Revised Statutes Annotated section 51:714(C)(1) (West 1987). *See Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988). The period set by section 51:714(C)(1) commences when " 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge' thereof. . . . Investors are not free to ignore 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions in his securities transaction." *Id.* at 606-07 (citations omitted). Mr. Simmons' affidavit states that he learned of defendants' alleged concealment of the pending TGX litigation in March 1989, so as to render timely the March 1990 filing of plaintiffs' suit.

Defendants have not offered viable evidence to refute plaintiffs' assertion that the 1990 suit was timely filed under section 51:714(C)(1). Defendants claim plaintiffs should have known of the pending TGX litigation as early as 1987, when defendants disclosed same in their required filings with the SEC. Plaintiffs' response to defendants' claim is two-fold: Plaintiffs claim (1) TGX's 1987 10-K only briefly and vaguely referred to pending litigation, and thus did not create a "storm warning" sufficient to trigger the two-year limitations period; and (2) that even if the brief statement in TGX's 1987 10-K were sufficient to trigger the limitations clock, the

10-K was not actually filed with the SEC until March 25, 1988. Plaintiffs' second response is uncontested, and defeats defendants' claim that plaintiffs' action was not timely filed. Plaintiffs filed their action less than two years after defendants filed the 10-K form which defendants claim disclosed the pending TGX litigation. Plaintiffs action was thus timely filed even if the 10-K were sufficiently descriptive so as to commence the running of section 51:714(C)(1)'s limitations clock.

Plaintiffs thus satisfy all three requirements for reinstatement under section 27(A)(b). The court therefore now turns to the question of section 27(A)'s constitutionality.[3]

B. *Constitutional Analysis*

Section 27(A) is unconstitutional, as it violates established separation of powers principles. Congressional enactments are entitled to deference regarding their constitutionality, but section 27(A) cannot stand because, although Congress has changed the law, it has done so in a manner inconsistent with the constitutional mandate established in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991).[4]

Congressional enactments are entitled to deference regarding their constitutionality, but said deference is not

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[3] The court was required to determine whether plaintiffs satisfied the facial requirements for reinstatement before it addressed section 27(A)'s constitutionality. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (" 'Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' . . . 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' " (citations omitted)).

[4] Having concluded that section 27(A) violates separation of powers principles, the court declines to address defendants' claim that the application of section 27(a) would violate due process as well.

absolute. "It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid." *Communication Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988) (citations omitted). When courts are reviewing constitutional challenges to such statutes, however, "statutory construction may not be pressed 'to the point of disingenuous evasion.'" *Id.* (citation omitted). The aforestated deference thus cannot sustain a congressional enactment that contravenes established constitutional principles.

Two related constitutional principles are herein at issue. The first principle is that while "Congress can *amend* or *repeal* any law . . . [it] cannot 'prescribe a rule for a decision of a cause in a certain way' where 'no new circumstances have been created by legislation.'" *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990), *cert. granted*, 111 S.Ct. 2886 (1991) (quoting *United States v. Klein*, 80 U.S. 128, 147 (1871)) (emphasis in original). The second constitutional principle at issue is that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2448 (1991). Section 27(A) does not contravene the first of these principles, but it does contravene the second and is thus unconstitutional.

Congress has changed the law with the enactment of section 27(A): Section 27(A) represents a change in the law, such that Congress has not contravened the separation of powers principles established by *Klein* and its progeny. Before section 27(A), all section 10(b) claims were properly subject to the limitations period announced in *Lampf* and made to apply retroactively by

Beam. Section 27(A) then changed the law, by limiting *Lampf* to prospective application only.

Lampf and *Beam* together establish that all section 10(b) claims ever filed should have been subject to a "one-year-from-discovery-and-three-year-from-transaction" limitations period. *Lampf* announced this limitations period, *see* 111 S.Ct. at 2780-81, and *Beam* mandated that *Lampf* be afforded full retroactive effect. As explained in *Beam*, the *Lampf* Court was not making law, but rather, was " 'finding it'—discerning what the law *is*, rather than decreeing today what it is today *changed to*, or what it will *tomorrow* be." *Beam*, 111 S.Ct. at 2451 (Scalia, J., concurring) (emphasis in original). The limitations period "found" in *Lampf* thus did not represent a change in the law, but rather, a mere clarification what the law has always been. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error.

Lampf, through *Beam*, thus established what the law has always been, and section 27(A) changed that law. After *Lampf* and *Beam*, but before the enactment of section 27(A), it was clear that section 10(b) claims filed pre-*Lampf* and post-*Lampf* were all properly subject to the limitations period stated in *Lampf*. Section 27(A) then rewrote the law, limiting *Lampf* to prospective application by stating that *Lampf* would not apply to section 10(b) claims filed before June 20, 1991. Section 27(A) stated that these pre-*Lampf* claims would once again be subject to the applicable jurisdiction's pre-*Lampf* limitations rule. Between June 20, 1991, and December 19, 1991, pre-*Lampf* claims were thus subject to the *Lampf* rule, while after December 19, 1991, said claims were subject to the applicable jurisdiction's pre-*Lampf* limitations rule. Section 27(A) thus changed the law, by altering the limitations period applicable to pre-*Lampf* claims.

Congress has thus changed the law, so as not to implicate the separation of powers principles established by *Klein* and its progeny. The court now turns to the question of whether Congress has changed the law in a permissible manner.[5]

B. *Section 27(A) contravenes the constitutional mandate established in* Beam: While Congress has changed the law, it has done so in a manner inconsistent with the constitutional mandate established in *Beam*. Section 27(A) thus violates separation of powers principles, such that it is unconstitutional and cannot be applied to reinstate plaintiffs' claims.

In *Beam*, the Court addressed the retroactive application of judicial precedent. Justice Souter, delivering the judgment of the Court, first outlined the retroactivity principles to which precedent had previously been subject. *Beam*, 111 S.Ct. at 2443-44. One such principle, described as "selective prospectivity," held that "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." *Id.* at 2444.

Recognizing the inequity inherent in selective prospectivity, Justice Souter proceeded to abandon the principle in the civil context. Justice Souter began by stating that

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[5] This court thus agrees with the court in *Bankard v. First Carolina Communications, Inc.*, 1992 WL 3694, at *6 (N.D. Ill. Jan. 6, 1992), which found that Congress had changed the law with the enactment of section 27(A). This court disagrees with the *Bankard* court, however, to the extent it believed such a finding ended the separation of powers inquiry. Once a court finds that a congressional enactment has changed the law, the court must then review the enactment itself, to assure that its substance does not constitute an impermissible legislative encroachment on the judicial power. Thus, because this court has determined that section 27(A) has changed the law, the court must now consider whether section 27(A) changes the law in a manner consistent with established separation of powers principles.

"selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Id.* For this reason, Justice Souter continued, the Court had already abandoned selective prospectivity in the criminal context. *Id.* at 2444-45 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Justice Souter then explicitly adopted *Griffith* in the civil context, stating that "*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *Id.* at 2446 (citation omitted). Justice Souter then concluded in strong terms, stating that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 2448. Three separate concurrences confirm the Court's rejection of selective prospectivity. *See id.* at 2448-51 (White, J., concurring; Blackmun, J., concurring; Scalia, J., concurring).

The Court's rejection of selective prospectivity was rooted in article III of the constitution. While Justice Souter did not explicitly reference article III, his reliance on, and adoption of *Griffith* confirm that his opinion was constitutionally based. *Griffith* rested squarely on constitutional grounds, holding that article III required full retroactive application of the Court's decisions to pending criminal cases. As the Court therein stated,

> failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that this Court adjudicates only "cases" and "controversies." See U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review

> requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

Griffith, 479 U.S. at 322-23. Justice Souter's exhaustive reliance on *Griffith* thus confirms that his *Beam* opinion was of constitutional magnitude.

The concurrences in *Beam* further confirm that the Court's rejection of selective prospectivity was constitutionally based. Like Justice Souter, Justices White and Blackmun each relied heavily on *Griffith*, *see Beam*, 111 S.Ct. at 2448-50 (White, J., concurring; Blackmun, J., concurring), and thus ultimately on article III. The clearest constitutional pronouncement, however, came from Justice Scalia. In a concurrence joined by Justices Marshall and Blackmun, Justice Scalia stated that "[i]f the division of federal powers central to the constitutional scheme is to succeed in its objective . . . the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted." *Id.* at 2450 (Scalia, J., concurring). Justice Scalia first described the scope of Executive power, *see id.*, and then continued: "So also . . . '[t]he judicial power of the United States' conferred upon this Court . . . must be deemed to be the judicial power as understood by our common-law tradition. That is, the power 'to say what the law is,' not the power to change it." *Id.* at 2450-51 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Justice Souter's opinion for the Court, combined with the aforestated concurrences thus established that the Court's rejection of selective prospectivity was constitutionally based.

Beam thus reflects a judicial interpretation of the constitution, such that congressional enactments inconsistent therewith must fall. It is well-settled that the Court is

the ultimate arbiter of the constitution, and that Congress cannot enact legislation contrary to the Court's constitutional doctrine. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is, emphatically, the province and duty of the judicial department to say what the law is. . . . So, if a law be in opposition to the constitution . . . the court must determine which of these conflicting rule governs the case: this is of the very essence of judicial duty."). Regarding the present case, *Beam* found unconstitutional the selective prospectivity principle that "a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 111 S.Ct. at 2444. Thus, if section 27(A) triggers the selective prospectivity proscribed in *Beam*, section 27(A) must be found unconstitutional.

The court believes section 27(A) does effect the selective prospectivity constitutionally proscribed in *Beam*, such that section 27(A) is unconstitutional. By limiting *Lampf* to prospective application, Congress has contravened *Beam* by causing similarly situated litigants to be treated dissimilarly. Prior to *Lampf*, the *Lampf* plaintiffs and the current plaintiffs were similarly situated. The *Lampf* plaintiffs then had their claims dismissed based on the rule announced and applied therein. Thus, the *Lampf* Court "appl[ied] a new rule in the case in which it [was] pronounced." *Id.* The current plaintiffs, by contrast, are able to urge their claims because section 27(A) shields them from *Lampf* by reviving the jurisdiction's preexisting limitations rule. Congress has thus "return[ed] to the old [rule] with respect to all others arising on facts predating the pronouncement." *Id.* Congress has thus effected the exact selective prospectivity found unconstitutional in *Beam*. As such, section 27(A) must fall.[6]

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[6] The court's conclusion is consistent with the first Fifth Circuit case to apply *Beam*. In *Sterling v. Block*, 953 F.2d 198 (5th Cir. 1992), the court considered whether *Davis Oil v. Mills*, 873 F.2d 774 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989), should

Thus, although plaintiffs satisfy the facial requirements for reinstatement under section 27(A), plaintiffs' motion must be denied because section 27(A) contravenes the constitutional mandate established in *Beam*.

III. CONCLUSION

It is hereby ADJUDGED, ORDERED and DECREED that plaintiffs' motion to reinstate is DENIED. Consistent with footnote 1, counsel for defendants are jointly requested to submit a judgment dismissing plaintiffs' state claims.

/s/ Peter Beer
PETER BEER
United States District Judge

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be applied retroactively. Applying *Beam*, the court concluded "that because the holding in *Davis Oil* was applied retroactively to the parties in that case, it must be applied retroactively here." *Id.* at 199. Similarly in this case, "because the holding in *Lampf* was applied retroactively to the parties in that case, it must be applied retroactively here." Section 27(A) precludes this result, and thus it cannot stand.

APPENDIX F

[Filed Oct. 17, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION M

TGX CORP.

versus

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

Consolidated With

Civil Action No. 90-0849

SECTION M

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

versus

J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON

JUDGMENT

The court has issued Minute Entries in the above-styled action on September 25, 1991, and October 16, 1991. Consistent with these Minute Entries, it is hereby ordered,

adjudged, and decreed that all federal and state claims in plaintiffs' fifth amended counterclaim to the 1987 action are DISMISSED. The state claims are dismissed without prejudice.

New Orleans, Louisiana, this 16th day of October, 1991.

/s/ Peter Beer
PETER BEER
United States District Judge

APPENDIX G

MINUTE ENTRY
BEER, J.
OCTOBER 16, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION M

TGX CORP.

versus

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

Consolidated With

Civil Action No. 90-0849

SECTION M

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

versus

J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON

The following motions in the above-styled action were heard on October 16, 1991: (1) Defendant BDO Seidman's Motion to Alter or Amend Order on Motion for Summary Judgment on Negligent Misrepresentation Claim (2) Plaintiffs' Motion for Reconsideration of the dismissal of its fraud and Blue Sky claims.

Motion (1) is hereby GRANTED insofar as the court vacates and withdraws the portion of its September 25, 1991, Minute Entry denying defendant BDO Seidman's motion for summary judgment. The court thereby leaves it to a state court to interpret *Monco* and the scope of accountant liability under Louisiana's negligent misrepresentation law.

Motion (2) is hereby DENIED. The Fifth Circuit's recent opinion in *Newport* does not indicate that the court erred in refusing to retain pendent jurisdiction over plaintiffs' fraud and Blue Sky claims after it had dismissed plaintiffs' federal and Count Six claims.

/s/ Peter Beer
PETER BEER
United States District Judge

APPENDIX H

MINUTE ENTRY
BEER, J.
SEPTEMBER 27th, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION M

TGX CORP.

versus

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

Consolidated With

Civil Action No. 90-0849

SECTION M

GAYLON D. SIMMONS AND
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versus

J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON

The following motions in the above-styled action were heard on September 18, 1991: (1) Defendant BDO Seidman's Motion for Summary Judgment on Plaintiffs' Negligent Misrepresentation Claim; (2) Defendant BDO Seidman's Motion to Dismiss or, alternatively, for Summary Judgment on Plaintiffs' Fifth Amended Counterclaim; (3) TGX Corporation's Motion for Review of Magistrate's Ruling on Plaintiffs-in-Counterclaim's Motion for Leave to File Fifth Amended Counterclaim; (4) Defendant BDO Seidman's Motion for Review of Magistrate's Order granting plaintiffs leave to file a fifth amended counterclaim; (5) Defendants' (individual TGX directors and Bracewell & Patterson) Objection to Magistrate's Ruling or, alternatively, Motion to Dismiss, and (6) Defendant Greenwich Insurance Company's Objection to Magistrate' Ruling or, alternatively, Motion to Dismiss.

The court holds that motion (1) is denied. Motions (2)-(6) are granted insofar as the federal claims contained in plaintiffs' fifth amended counterclaim are dismissed as time-barred, and the state claims are dismissed based on this court's discretionary refusal to exercise pendent jurisdiction. The state claims are dismissed without prejudice, leaving plaintiffs to pursue those claims in state court.

BACKGROUND

In November 1986, the Simmons sold their full interest in LEDCO, Inc., to TGX Corp. (TGX) for approximately $21,000,000. Plaintiffs received $11,000,000 in cash; 300,000 shares of preferred TGX stock, valued at approximately $3,000,000; real property; forgiveness of a $1,000,000 debt owed by plaintiffs to LEDCO; and, deferred consideration of $5,000,000 plus interest, to be paid in annual installments.

Plaintiffs contend that, because the TGX stock has proven worthless and none of the deferred payments has

been made, they have received only $13,000,000 instead of the expected $21,000,000. Plaintiffs claim their $8,000,000 in damages was caused by their reliance on TGX's financial statements in agreeing to the LEDCO sale. Plaintiffs contend the statements did not disclose the existence of a lawsuit pending against TGX, which caused the devaluation of TGX stock and rendered TGX unable to honor its deferred payment obligations. TGX was eventually forced into bankruptcy.

TGX sued the Simmons in 1987, and the Simmons counterclaimed alleging violations of the Securities Act of 1933 ("1933 Act"), the Securities Exchange Act of 1934 ("1934 Act") and the Louisiana Blue Sky law. The suit was automatically stayed when TGX filed for bankruptcy under Chapter 11 in February 1990. On March 3, 1990, the Simmons filed suit against TGX's individual directors, and its law (Bracewell & Patterson) and accounting (BDO Seidman) firms, alleging negligent misrepresentation and violations of Section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law. The 1987 and 1990 suits have been consolidated, and the matter is set for trial in March 1992.

I. DEFENDANT BDO SEIDMAN'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM

Defendant, as TGX's accounting firm, prepared the financial statements on which plaintiffs allegedly relied in agreeing to the LEDCO sale. Plaintiffs claim defendant is guilty of negligent misrepresentation because TGX's financial statements did not accurately reflect TGX's troubled financial status prior to the LEDCO deal. Defendant seeks summary judgment, claiming it had no duty to plaintiffs under Louisiana's negligent misrepresentation law and therefore cannot be held liable for their losses.

Defendant's motion for summary judgment is hereby denied. As accountant for a publicly-traded corporation,

defendant had a duty to all potential investors, including plaintiffs, to provide accurate financial information on which they could base investment decisions. Material questions remain as to whether defendant discharged its duty. Such questions preclude the entry of summary judgment on defendant's behalf.

The law of summary judgment is well-settled. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.["] Fed.R.Civ.P. 56(c). When the moving party has carried its burden under Rule 56(c), the burden shifts and the nonmoving party can defeat a summary judgment motion only by "set[ting] forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Because Louisiana law applies in this case, it determines what facts are "material" to plaintiffs' action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The parties agree that Louisiana has adopted Restatement 2d of Torts section 552, entitled "Information Negligently Supplied for the Guidance of Others," for evaluating negligent misrepresentation claims. The parties cite different subsections of section 552, however, to support their respective contentions. Defendant relies on subsections (2)(a) and (2)(b), which state that the liability of one who negligently misinforms another is limited to the loss suffered

> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552(2) (1977). Plaintiffs, by contrast, rely on subsection (3), which states that

> The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, and any of the transactions in which it is intended to protect them.

Id. at § 552(3). Whether subsection (2) or subsection (3) applies thus hinges on whether defendant was under a public duty to provide accurate information in TGX's financial reports.

The court finds that defendant had a public duty to provide accurate information concerning TGX's financial health. This duty has been created by both statute and common law. A legal duty may be created by statute. *French Mkt. Plaza Corp. v. Sequoia Ins. Co.*, 480 F.Supp. 821, 824-25 (E.D.La. 1979). The federal securities laws obligate public accountants to provide fair and accurate information concerning a public corporation's financial status. *See, e.g.*, 15 U.S.C.A. §§ 78m(a), 78r(a) (1981). Thus, defendant had a statutory duty to the investing public to provide accurate financial information regarding TGX.

The Supreme Court has similarly imposed a duty on accountants to provide the public with accurate information. In *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Internal Revenue Service sought to investigate corporate tax returns which had been reviewed and verified by respondent public accounting firm. Respondent corporation ordered the accounting firm to withhold requested tax accrual papers, claiming they were privileged. The Court held that the summons compelling production of said documents was enforceable, rejecting a claim that the tax accrual papers were analogous to the attorney work product found unreach-

able in *Hickman v. Taylor*, 329 U.S. 495 (1947). *Id.* at 817. The Court stated that the *Hickman* doctrine was based on the attorney's role as a private, confidential advisor, while

> [a]n independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client.

Id. at 817 (emphasis in original). Similar to its statutory duty, defendant thus also had a common law duty to provide accurate information to the investing public.[1]

Because defendant was under a public duty, Restatement 2d section 552(3) applies, and the question becomes whether plaintiffs were members of the class of

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[1] Defendant cites *First National Bank of Commerce v. Monco*, 911 F.2d 1053 (5th Cir. 1990), in claiming it had no duty to plaintiffs, and that summary judgment on plaintiffs' claim is therefore proper. The *Monco* court, applying Louisiana law, affirmed a summary judgment in favor of an accounting firm on whose financial report a bank had relied in making a defaulted loan to the firm's client. The court stated that summary judgment was proper because "Louisiana law does not protect every reasonably foreseeable consumer of inaccurate auditing information." *Id.* at 1055.

Monco can be distinguished from the current proceedings. Unlike BDO Seidman, the accounting firm in *Monco* believed its audit report would be distributed only to a small, ascertainable group of third parties. There is no indication the client in *Monco* was a publicly-traded company subject to federal disclosure requirements. The accounting firm in *Monco* reasonably believed its report would go only to select recipients, and it was only to those recipients that the firm owed a duty of accuracy. Accordingly, the firm was not liable when the report was relied upon by a bank not in the foreseeable class of recipients. By contrast, defendant BDO Seidman was aware that potential investors in TGX would rely on its report. As such, its duty extended beyond the limited duty imposed on the accounting firm in *Monco*.

persons for whose benefit the duty has been created. As potential investors in a publicly-traded corporation, plaintiffs appear to be the exact persons for whom the public duty was created. The federal disclosure requirements were enacted to benefit investors by promoting fairness in corporation-investor transactions. *See Fisher v. Kletz*, 266 F.Supp. 180, 184 (S.D.N.Y. 1967) (section 13(a) of the 1934 Act, 18 U.S.C.A. § 78m(a) (1981), requires a public accountant to "report fairly on the facts as he finds them whether favorable or unfavorable to his client. His duty is to safeguard the public interest, not that of his client."). Investors such as plaintiffs thus are within the class of persons for whose benefit defendant's duty to provide accurate informaiton was created.

Defendant thus had a public duty to provide plaintiffs with accurate information concerning TGX's financial status. Material questions bearing on the discharge of that duty remain contested, and summary judgment is therefore improper. Plaintiffs claim that a brief statement in defendant's 1986 SEC filings [2] did not satisfy federal disclosure requirements. Whether the filings represented a fair and accurate disclosure of TGX's status so as to discharge defendant's public duty constitutes a material question of fact sufficient to deny defendant's motion for summary judgment.[3]

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[2] In 1986 SEC filings, the only reference to pending litigation in was that [*sic*], "From time to time, in the normal course of business, the Company is a party to various matters of litigation. Management is of the opinion that the eventual outcome of these matters will not have a material adverse effect on the Company."

[3] An additional reason for denying defendant's motion is that plaintiffs have not completed their discovery. Federal Rule of Civil Procedure 56(f) states that a court may refuse an application for summary judgment in order to "permit affidavits to be obtained or depositions to be taken or discovery to be had. . . ." Fed. R. Civ. P. 56(f). The Fifth Circuit has recently held that summary judgment motions should more readily be denied where the nonmovant has not completed its discovery. *See International Shortstop, Inc. v. Rally's, Inc.*, No. Civ. 90-8563, slip op. at 5737-39 (5th Cir. Aug. 29, 1991).

Defendant's motion for summary judgment is hereby denied.

II. MOTIONS OBJECTING TO MAGISTRATE'S RULING OR, ALTERNATIVELY, SEEKING DISMISSAL OF PLAINTIFFS' FIFTH AMENDED COUNTERCLAIM

On August 22, 1991, Magistrate Wynne granted plaintiffs leave to file a fifth amended counterclaim in the 1987 suit. Leave was granted pursuant ot Federal Rule of Civil Procedure 15(a), which states that second and subsequent leaves to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Magistrate Wynne granted plaintiffs' motion on a procedural basis only, and expressly left it to this court to determine whether substantive law bars plaintiffs' claims. The remaining motions heard on September 18 all challenge Magistrate Wynne's ruling or, alternatively, seek dismissal of the claims contained in plaintiffs' fifth amended counterclaim.[4]

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[4] Plaintiffs' fifth amended counterclaim contained the following allegations:

(1) J.C. Templeton, President and Chairman of the Board of TGX, was charged with (a) violating section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy to defraud; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(2) TGX Corp. was charged with (a) violating section 12(2) of the 1933 Act; (b) violating section 10(b) of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (c) breach of contract; (d) fraud; and, (e) misrepresentation;

(3) BDO Seidman, TGX's accounting firm, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; and, (b) negligent misrepresentation;

(4) Bracewell & Patterson, TGX's outside counsel, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy

A. *Federal Securities Claims*

Magistrate Wynne did not address defendants' contentions that the federal claims in plaintiffs' fifth amended counterclaim are barred by res judicata or, alternatively, that they are time-barred under the Supreme Court's recent decision in *Lampf v. Gilbertson*, 1991 U.S. LEXIS 3629 (June 20, 1991). This court now holds that plaintiffs' federal claims are not barred by res judicata, but are time-barred because the claims cannot relate back to the date of plaintiffs' original filing in the 1987 suit. The federal claims contained in plaintiffs' fifth amended counterclaim are therefore dismissed as untimely.

Res Judicata: The federal claims in plaintiffs' fifth amended counterclaim are not barred by res judicata. The federal claims were dismissed from the 1990 suit without prejudice. Such a dismissal is not on the merits, and therefore does not trigger res judicata.

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to defraud; and, (c) vicarious liability for the acts of its agent, Joe Foy;

(5) Joe Foy, a partner at Bracewell & Patterson and a director of TGX, was charged with (a) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; (b) conspiracy to defraud; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(6) Individual director defendants Carlson, Enloe, Griffin, Kister, Leon, W. Templeton, and Cotham were charged with (a) conspiracy to defraud; (b) violating section 10b of the 1934 Act, Rule 10b-5 promulgated thereunder, and the Louisiana Blue Sky law; and, (c) controlling person liability for TGX Corp.'s alleged violations of the 1933 and 1934 Acts;

(7) Individual director defendants J.C. Templeton, Foy, Carlson, Enloe, Griffin, Kister, Leon, W. Templeton and Cotham were charged with (a) tortious interference with contract; (b) breach of fiduciary duty; (c) negligent mismangement; (d) fraud; and, (e) negligent misrepresentation; and

(8) Greenwich Insurance Co., liability insurer of director defendants, was charged with solidary liability and wrong refusal to pay or settle a claim.

In August 1991, plaintiffs' federal securities claims in the 1990 lawsuit were dismissed without prejudice by this court. *See* Judgment and Order of August 5, 1991. The Supreme Court has recently stated that a " '[d]ismissal without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2456 (1990) (quoting Fed. R. Civ. P. 41(a)(1)). The Fifth Circuit has similarly stated that res judicata attaches only to dismissals on the merits. *See Steven D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46 (5th Cir. 1989).

Defendants cite *Thompson Trucking* and *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (en banc), to support their contention that the federal securities claims in plaintiffs' fifth amended counterclaim are barred by res judicata. Both precedents are distinguishable from the current proceedings.

Thompson Trucking held a limitations-based dismissal to be on the merits and therefore capable of triggering res judicata. *Thompson Trucking*, 870 F.2d at 1046. Defendants argue that, because the dismissal of plaintiffs' federal securities claims from the 1990 suit was limitations-based, the dismissal was on the merits and res judicata applies. Defendants ignore, however, the crucial distinction between *Thompson Trucking* and plaintiffs' claims. The claim in *Thompson Trucking* was dismissed with prejudice, while plaintiffs' claims in the 1990 suit were dismissed without prejudice. Consistent with *Cooter & Gell*, *Thompson Trucking* merely held that a dismissal with prejudice constitutes a final judgment on the merits for res judicata purposes. *Thompson Trucking* does not address the res judicata effects of a dismissal without prejudice.

Defendants reliance on *Nilsen* is similarly misplaced. Plaintiff in *Nilsen* filed four consecutive suits alleging Title VII violations by her employer. In *Nilsen I*, plain-

tiff's claim was dismissed without prejudice, and thus did not bar the filing of *Nilsen II* and *III*. Plaintiff then filed *Nilsen IV*, which the Fifth Circuit dismissed on res judicata grounds based on the dismissals of *Nilsen II* and *III*. Both *Nilsen I* and the Simmons' federal claims in the 1990 suit were thus dismissed without prejudice, and just as the dismissal of *Nilsen I* did not bar the filing of *Nilsen II-III*, the dismissal of the Simmons' federal claims from the 1990 suit does not bar the filing of their fifth amended counterclaim.

The federal securities claims in plaintiffs' fifth amended counterclaim are not barred by res judicata.

Time-Bar and Relation Back: While the federal securities claims in plaintiffs' fifth amended counterclaim are not barred by res judicata, they are time-barred because the claims cannot relate back to plaintiffs' original filing in the 1987 suit.

In *Lampf v. Gilbertson*, 1991 U.S. LEXIS 3629 (June 20, 1991), the Supreme Court held that litigation under section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, had to be commenced within one year of the discovery of an alleged violation and within three years of such alleged violation. The three year period was defined as a "period of repose," granting potential defendants a substantive right to be free from liability arising out of a challenged transaction after the period had run. The parties have already agreed that *Lampf* applies retroactively to bar plaintiffs' federal securities claims in the 1990 suit. The parties disagree, however, on whether the claims are similarly barred in the 1987 suit.

The relevant transaction between plaintiffs and TGX closed on November 14, 1986. Plaintiffs state they first discovered the alleged violations of section 10(b) and Rule 10b-5 in March 1989. They filed an amended counterclaim alleging fraud on April 25, 1989, within the time limits set by *Lampf*. Whether the federal claims in plain-

tiffs' fifth amended counterclaim are now time-barred hinges on whether said claims can relate back to the date of plaintiffs' original filing.

Defendants claim that, since the three year period set in *Lampf* is a period of repose, it cannot be circumvented by relation back under Federal Rule of Civil Procedure 15. They cite *Resolution Trust Corp. v. Olsen*, 1991 U.S. Dist. LEXIS 10337 (D. Ariz. May 31, 1991), in which the court stated that "relation-back under Rule 15 does not apply when the statute at issue defines substantive rights rather than merely limiting procedural remedies." Plaintiffs claim that, regardless of whether the limitations period is a statute of limitations (procedural) or a period of repose (substantive), relation back is proper as long as defendants had notice during the limitations period that they may be subject to liability, and the relation back would not cause defendants undue prejudice.

Plaintiffs' federal claims should not be barred merely because the three year limitation stated in *Lampf* is a period of repose. Rule 15(c) speaks only of the "period provided by law for commencing the action," Fed. R. Civ. P. 15(c), and thus does not distinguish between periods of repose and statutes of limitations. Moreover, courts have permitted relation back under section 12(2) of the Securities Act of 1933, despite a period of repose similar to that set in *Lampf* for section 10(b) and Rule 10b-5. *See, e.g., Kilmartin v. H.C. Wainwright & Co.*, 637 F. Supp. 938, 943 (D. Mass. 1986) (amended complaint relates back, despite expiration of section 12(2)'s period of repose, because notice and prejudice requirements of Rule 15(c) are satisfied); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 453 (S.D.N.Y. 1985) (amendment adding section 12(2) claim after expiration of period of repose relates back because defendant cannot prove undue prejudice or delay of trial). *Kilmartin* and *Brener* hold that a period of repose is not a per se

bar to relation back. There is no basis for holding that the period of repose set in *Lampf* should have a more preclusive effect that the period set for section 12(2). Whether plaintiffs' claims are time-barred, therefore, hinges solely on whether the requirements of Rule 15(c) have been satisfied.

This court now holds that plaintiffs' claims are time-barred because plaintiffs cannot satisfy the requirements for relation back. Based on Rule 15(c), the Supreme Court has established four factors which plaintiffs must prove for their fifth amended counterclaim to relate back to their original filing:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 477 U.S. 21, 29 (1986). All four factors must be satisfied before relation back will apply. *Id.; Bell v. Veterans Admin. Hosp.,* 826 F.2d 357, 360 (5th Cir. 1987).

Plaintiffs arguably can satisfy the first and second *Schiavone* requirements, but they cannot satisfy the third and fourth requirements. Plaintiffs' federal securities claims therefore cannot relate back to plaintiffs' original filing in the 1987 suit, and the claims are untimely under *Lampf.*

Rule 15(c) was intended to ameliorate the harsh consequences that would otherwise result where a confusing bureaucratic structure caused a plaintiff to name the wrong government agency or the wrong member of a corporate conglomerate as defendant. *See* Fed. R. Civ.

P. 15(c) advisory committee's note to 1966 Amendment. Rule 15(c) was not designed to afford plaintiffs a second chance where they omit defendants from earlier claims based not on mistaken identity, but rather on a tactical decision believed at the time to be in plaintiffs' best interests. The Simmons knew the identities of all defendants at the filing of their 1989 counterclaim, as such information was contained in the financial documents which plaintiffs reviewed prior to entering the LEDCO sale. Plaintiffs chose to name only the corporate defendant, however, because they feared Rule 11 sanctions if their securities claims later proved to be unfounded. " 'Relation back' will not apply where, as here, the plaintiff is aware of a potential defendant, but is simply unsure about that party's potential liability." *Milandra Milling Corp. v. Ogilvie Mills, Inc.*, 746 F. Supp. 40, 42-43 (D. Kan. 1990) (footnote omitted).

The federal securities claims in plaintiffs' fifth amended counterclaim cannot relate back to the filing of plaintiffs' 1989 counterclaim. These claims are therefore time-barred by the three year periods of reposes for section 12(2) of the 1933 Act, section 10(b) of the 1934 Act, and Rule 10b-5 promulgated thereunder. The federal securities claims in plaintiffs' fifth amended counterclaim are hereby dismissed.

B. *State Law Claims*

Plaintiffs fifth amended counterclaim also contains two sets of state law claims. One set, pled in Count Six of plaintiffs' original complaint, alleges breach of fiduciary duty and tortious interference with contract. The second set contains fraud claims and a claim under Louisiana's Blue Sky law. La. Rev. Stat. Ann. § 51:701-724 (West 1987 & Supp. 1991). The court now hereby declines to exercise its pendent jurisdiction [5] and dismisses both sets

[5] The court notes that there is no diversity jurisdiction over plaintiffs' state claims because there is not complete diversity

of state law claims without prejudice, leaving plaintiffs to pursue those claims in state court.

Plaintiffs' state law claims would be subject to this court's jurisdiction if federal question jurisdiction were present and the state claims were subject to pendent jurisdiction. To establish pendent jurisdiction, plaintiffs must prove that their "state and federal claims . . . derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Count Six claims: In their original counterclaim, plaintiffs alleged, inter alia, breach of fiduciary duty and tortious interference with contract. Because the events supporting these claims occurred after the November 1986 transaction on which plaintiffs' federal claims were based, the state claims were never subject to this court's pendent jurisdiction.[6] These state claims are hereby dismissed without prejudice, leaving plaintiffs to pursue these claims in state court.

Fraud and Louisiana Blue Sky claims: Plaintiffs' federal claims have herein been dismissed. "When a . . . narrowing of the issues excludes all federal claims, whether a pendant [*sic*] state claim should be remanded to state court is a question of judicial discretion . . . ." *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980) (citations omitted), *cert. denied sub nom. Sheet Metal Workers'*

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among the parties. Plaintiffs and defendant William Templeton are domiciled in Louisiana.

[6] *See Texwood, Ltd. v. Gerber*, 621 F.Supp. 585 (S.D.N.Y. 1985). In *Texwood*, plaintiff joined state claims with a federal 10b-5 claim. The court dismissed a state claim alleging post-sale breach of fiduciary duty, because the facts supporting the state claim arose after the sale which formed the basis of the federal claim. *Id.* at 590. Similar to the dismissed state claim in *Texwood*, plaintiffs' Count Six claims arise from post-transaction facts distinct from the pre-transaction facts supporting their federal claims. *Texwood* demonstrates that the Count Six claims are not subject to the court's pendent jurisdiction, and should be dismissed.

Int'l Ass'n v. Carter, 450 U.S. 949 (1981). The court hereby exercises its discretion and dismisses these state claims without prejudice, leaving plaintiffs to pursue these claims in state court.

The Supreme Court has indicated that dismissal of plaintiffs' fraud and Blue Sky claims is proper. In *United Mine Workers v. Gibbs*, the Court stated that,

> if the federal claims are dismissed before trial . . . the state claims should be dismissed as well. (footnote omitted) Similarly, if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Gibbs, 383 U.S. at 726-27. Both examples in *Gibbs* support the dismissal of plaintiffs' fraud and Blue Sky claims. Plaintiffs' federal claims are being dismissed pre-trial; and, once plaintiffs' federal claims are dismissed, state issues not only will "predominate," but will be the sole issues in the case. *Gibbs* states that such circumstances warrant the dismissal of plaintiffs' otherwise-pendent state claims. Plaintiffs' fraud and Blue Sky claims are therefore dismissed without prejudice, leaving plaintiffs to pursue these claims in state court.

In summary, plaintiffs' federal securities claims in the fifth amended counterclaim are not barred by either res judicata or the existence of a period of repose. The federal claims are time-barred, however, because the claims cannot relate back to plaintiffs' original filing. The federal claims are therefore dismissed.

All state claims in plaintiffs' fifth amended counterclaim are also dismissed. The claims contained in Count Six of plaintiffs' original complaint do not arise from the same nucleus of operative facts as the federal claims, and thus are not subject to the court's pendent jurisdiction. The fraud and Louisiana Blue Sky claims are dismissed in the

court's discretion. The dismissal of all state law claims is without prejudice, leaving plaintiffs to pursue these claims in state court.

CONCLUSION

Defendant BDO Seidman's motion for summary judgment on plaintiffs' negligent misrepresentation claim is DENIED. All remaining motions are GRANTED insofar as they seek dismissal of the federal and state claims contained in plaintiffs' fifth amended counterclaim to the 1987 suit.

Defendants are requested jointly to submit a judgment consistent with this minute entry.

/s/ Peter Beer
PETER BEER
United States District Judge

APPENDIX I

MINUTE ENTRY
WYNNE, M. J.
AUGUST 22, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number: 87-5298
c/w 90-0849

SECTION: "M" (2)

TGX CORPORATION

versus

GAYLON D. SIMMONS, *et. al.*

The plaintiffs filed a motion for leave to file a fifth amended counterclaim. The matter was taken under advisement following oral argument and the submission of supplemental memoranda by counsel.

The Magistrate having considered the record and the applicable law grants the motion for leave to file the fifth amended counterclaim on a procedural basis only pursuant to Rule 15(a). Whether or not the prescriptive statute involved in this case is a statute of repose which precludes the relation back of the counterclaim must be addressed at the time that the Court determines whether or not the counterclaim will relate back under Rule 15(c).

APPENDIX J

[Filed Aug. 5, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298

SECTION "M"

MAGISTRATE DIV. 2

TGX CORPORATION

versus

GAYLON D. SIMMONS AND
GLORIA ANNETTE TURNER SIMMONS

Consolidated With

Civil Action No. 90-0849

SECTION "M"
MAGISTRATE DIV. 2

GAYLON D. SIMMONS and
GLORIA ANNETTE TURNER SIMMONS

versus

J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W. A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, BRACEWELL & PATTERSON, BDO SEIDMAN, GREENWICH INSURANCE COMPANY and WILLIAM M. TEMPLETON

JUDGMENT AND ORDER

The several Motions to Dismiss for Failure to State a Claim or Alternatively for Summary Judgment of Defend-

ants in *Simmons, et ux. v. Templeton, et al.*, came on for hearing on Wednesday, July 24, 1991. Considering the motions, memoranda, affidavits, and materials on file, and the arguments of counsel; upon finding that no issue of material fact exists, all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and upon finding that there is no just reason for delay and that final judgment should be entered herein,

IT IS ORDERED, ADJUDGED AND DECREED that all of plaintiffs' claims against J. C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W. A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, William M. Templeton, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Company, Harbor Insurance Company, and Continental Insurance Company, asserted under Section 12 of the Securities Act of 1933, and the Securities Exchange Act of 1934 are hereby dismissed.

New Orleans, Louisiana, this 5th day of August, 1991.

/s/ Peter Beer
United States District Judge

APPENDIX K

MINUTE ENTRY
BEER, J.
AUGUST 5, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-5298
Consol. W/ 90-0849

SECTION M

TGX CORP.

versus

GAYLON SIMMONS, *et al.*

Defendants BDO Seidman, Greenwich Insurance Co., the individual defendants and Bracewell and Patterson's ("Movants") Motions to Dismiss, or in the Alternative, for Summary Judgment were heard on July 24, 1991. At the hearing all parties stipulated to the dismissal of the federal securities claims against the movants as time barred pursuant to *Lampf v. Gilbertson*, 1991 US Lexis 3629 (June 20, 1991). Judgment has since been entered dismissing these claims. Movants also contended that the remaining claims should be dismissed rather than retained under this court's pendant [*sic*] jurisdiction to hear state claims arising out of the same nucleus of operative fact as the federal claims.

Counsel for TGX Corporation conceded at the hearing that federal claims against it remain in the case. Accordingly, giving due consideration to the supplemental briefs filed by both Movants and the Simmons, the court declines

to take any action at this time, on either the main claims or on the claims which movant's describe as the "count six" claims.

/s/ P. B.
PETER BEER